Lowe's HIW, Inc. *and* Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters, Petitioner. Case 21–RC–20900

March 8, 2007

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on June 29 and 30, 2006, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 325 votes for and 450 against the Petitioner, with one void ballot and four challenged ballots, an insufficient number to affect the results. The hearing officer recommended that the election be set aside on the basis that the Employer engaged in objectionable conduct when its agent engaged in conversations with, and created the impression of surveillance among, employees waiting to vote. The Employer filed exceptions and a supporting brief.

The Board has reviewed the record in light of the exceptions and brief and has decided to affirm the hearing officer's findings[1] and recommendations[2] only to the extent consistent with this Decision and Certification of Results of Election. As discussed below, we find, contrary to the hearing officer, that the Employer did not engage in objectionable conduct warranting that the election be set aside. We therefore find that a Certification of Results of Election should be issued.

I. BACKGROUND

This case involves an election among various employees at the Employer's Perris, California distribution center, a large warehouse facility. The election was held over four polling sessions in a 2-day period in a centrally located operations office. Nonemployees were required to check in at the security office, a separate building within the Employer's parking lot. Due to the significant distance between the offices, the Employer arranged for transportation between the two sites. During the first polling session, the Employer directed Maria Rodriguez, a trainer in its human resources department,[3] to transport individuals between the offices in a golf cart. Rodriguez transported approximately nine individuals.

After transporting certain individuals to the voting area during the first hour of the first polling session, Rodriguez stood outside the operations office for a period of at least 20 minutes, holding the office door for employees waiting in line to vote while telling them to "have their votes ready."[4] A Board agent asked Rodriguez if she was going to vote; when Rodriguez indicated that she was not, the Board agent said that Rodriguez could not wait around or pass by the operations office. In a later instance during the first session, Rodriguez waited by the office with the golf cart. The Board agent again instructed Rodriguez that she could not loiter by the office if she was not voting.

After determining that Rodriguez acted as the Employer's agent while she was near the operations office, the hearing officer found that Rodriguez' conduct violated the rule announced in *Milchem, Inc.,* 170 NLRB 362 (1968). Under *Milchem,* an election will be set aside if a party to the election engages in prolonged conversation with prospective voters waiting in line to cast their ballots, regardless of the content of that conversation. The hearing officer additionally found, without engaging in any independent analysis, that Rodriguez' sustained presence "in the polling area" would reasonably tend to create the impression of surveillance among the employees waiting to vote. Based on these findings, the hearing officer recommended sustaining a portion of two of the Petitioner's objections and setting aside the election.

The Employer excepts, arguing that (a) Rodriguez was not its agent; (b) even if Rodriguez was its agent, her conduct did not violate the *Milchem* rule or create the impression of surveillance; and (c) even if Rodriguez' conduct violated the *Milchem* rule or created the impression of surveillance, the election should not be set aside.

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.,* 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the remainder of the Petitioner's objections to the election.

[3] There was no evidence or contention that Rodriguez is a supervisor.

[4] On this point, the hearing officer credited the testimony of employees Sylvia Rios and Antonia Cantera. Rios testified that she waited in line for 10 minutes, beginning at around 1:35 p.m., and that she saw Rodriguez opening and closing the door to the operations office and talking to employees in line to vote, though she did not hear what Rodriguez was saying. According to Rios, "several" people were in front of her in line, but she did not know how many employees Rodriguez spoke to. Cantera testified that she went to vote at approximately 1:50 p.m., and there were 10 employees in line. Rodriguez held the door to the office, "only mentioned that we should have our votes ready," and was still standing at the door to the office when Cantera left at approximately 1:57 p.m.

II. ANALYSIS

The Board has long maintained that an election must be set aside when a party representative engages in "prolonged" conversations with voters waiting in line to cast their ballots. Thus, the *Milchem* rule requires (1) conduct by a party that (2) involves prolonged conversations with employees waiting in line to vote. The hearing officer found both. We reach a different conclusion. Assuming, arguendo, that the Petitioner established Rodriguez's agency,[5] the Petitioner has not introduced sufficient evidence to establish that Rodriguez violated the *Milchem* rule.

In the recently decided *Longs Drug Stores California, Inc.,* 347 NLRB 500 (2006), the employer selected four lead employees to maintain control in the vicinity of the voting line. *Longs Drug Stores,* supra at 503. The employer instructed the lead employees to "'control the crowd and make sure that people were orderly in line and[,] if they were done voting[,] to leave the area and go back to work." Id. One of the lead employees told employees to "'get in line, hurry up, go to work, don't be talking.'" Id. The Board found that, regardless of whether the lead employees were agents, the conduct was not objectionable. We reach a similar conclusion here.

In the case at hand, the evidence shows that Rodriguez waited near the operations office with the golf cart while employees were waiting in line to vote, and, in an earlier instance lasting about 20 minutes, held the door for employees entering the operations office and told them to "have their votes ready." Regarding the former instance, there is no credible evidence that Rodriguez engaged in any conversation with voters in line, much less the prolonged conversation required to violate the *Milchem* rule. As for the latter, the Petitioner did not establish that the conversations were sufficiently prolonged. The evidence indicated that Rodriguez told employees waiting in line to vote to "have their votes ready." This conduct is comparable to the lead employee in *Longs Drug Stores* telling employees waiting in line to vote to "hurry up."[6] These brief statements cannot be considered prolonged conversation encompassed by the *Milchem* rule. Furthermore, we find no merit in the hearing officer's unsupported conclusion that Rodriguez's conduct created the impression of surveillance. Accordingly, we overrule the portions of the Petitioner's objections that the hearing officer recommended sustaining, and certify the results of the election.[7]

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters, and that it is not the exclusive representative of these bargaining unit employees.

[5] We find it unnecessary to pass on whether the hearing officer erred in finding that Rodriguez acted as the Employer's agent.

[6] It should also be noted that the election results were not close—the Petitioner lost the election by 125 votes—and there is no evidence that Rodriguez's conduct affected anything approaching that number of voters. The hearing officer's findings themselves would yield a maximum of 30 employees to whom Rodriguez spoke. Thus, even assuming that Rodriguez's conduct was objectionable, we cannot conclude that it materially affected the outcome of the election. See generally *Werthan Packaging, Inc.,* 345 NLRB 343, 346 (2006).

[7] Member Walsh agrees with his colleagues on the ultimate result in this case but reaches that decision differently. Member Walsh would find that the Petitioner failed to prove that Rodriquez was acting as the Employer's agent, and that Rodriquez' conduct, judged under the correct standard for evaluating electioneering at the polls, did not warrant setting the election aside.

There is no dispute that the Employer did not vest Rodriquez with actual authority beyond transporting individuals to and from the polling area. Member Walsh would find that the facts relied on by the hearing officer—that Rodriquez, a trainer in the human resources department, was asked to transport other employees to the polling area via golf cart; that she wore a T-shirt worn by other employees who opposed union representation; and that the Employer had at one time planned to use Rodriquez as one of its election observers—are insufficient to establish, in the circumstances of this case, that Rodriquez had apparent authority, i.e., that other "employees would reasonably believe that" Rodriquez was "speaking and acting for management." *Pan-Oston Co.,* 336 NLRB 305, 306 (2001). Because he would not find an agency relationship, Member Walsh would reverse the hearing officer's findings that the Employer, through Rodriquez's actions, violated the *Milchem* rule or created the impression of surveillance.

When faced with allegations of impermissible electioneering at the polls, the Board determines whether the conduct interfered with the free choice of voters, taking into consideration a number of factors, including whether it was conducted by a party or by employees, whether it occurred within or near the polling place, and whether it was conducted within a designated "no electioneering area," or contrary to the instructions of a Board agent. The Board also considers the nature and extent of the alleged electioneering. *Boston Insulated Wire & Cable Co.,* 259 NLRB 1118, 1118–1119 (1982). Applying these standards, Member Walsh finds merit in the argument that Rodriquez' conversations with voters and extended stays in the polling area may have been objectionable. Nevertheless, because only about 30 voters were exposed to Rodriquez' conduct, and the Petitioner lost the election by 125 votes, Member Walsh would not set the election aside on that basis.